



DIALOGUES

CONFERENCE ON THE FUTURE OF EUROPE

REFORMING THE EU OUTSIDE THE EU?
THE CONFERENCE ON THE FUTURE OF EUROPE
AND ITS OPTIONS

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ABSTRACT: This contribution to the *Dialogue* offers a first analysis of the recent initiative to establish a Conference on the Future of Europe – discussing whether it can become a new model to reform the EU, and if so, how it should be designed to succeed. The contribution examines the technicalities of the EU treaty amendment rules and emphasises the challenge that the need to obtain unanimous approval by all Member States poses towards reform. The contribution then assesses the increasing tendency by Member States to use international treaties outside the EU legal order and underlines how these have introduced new ratification rules, overcoming unanimity. Drawing lessons from these precedents, the contribution suggests that to achieve its ambitious reform objectives the Conference on the Future of Europe should consider the option to reform the EU outside the EU, by drafting a new, separate treaty with an entry-into-force rule which replaces unanimity with a super-majority vote.

KEYWORDS: Conference on the Future of Europe – EU reform – treaty amendments – *inter se* agreements – Political Compact – Brexit.

I. INTRODUCTION

Ahead of the European Parliament (EP) elections in Spring 2019, French President Emmanuel Macron – who had unveiled in a number of speeches an ambitious plan for a sovereign, united and democratic Europe¹ – proposed in an open letter, addressed to all European citizens and written in all the official languages of the EU, to set up a Conference for Europe as a way to renew the EU and to “propose all the changes our political project

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¹ E. MACRON, *Speech at Université La Sorbonne*, 26 September 2017, www.elysee.fr; E. MACRON, *Speech at the award of the Prix Charlemagne*, Aachen, 11 May 2018, www.elysee.fr.



needs".² Following the EP elections in May 2019 – which for the first time in the history of European integration saw a major increase in citizens' participation³ – the idea of a Conference on the Future of Europe was taken on board by the new EU leadership team.⁴ In particular, the new European Commission President Ursula von der Leyen committed in her political guidelines to establish "a Conference on the Future of Europe".⁵ Moreover, with Brexit – the withdrawal of the United Kingdom (UK) from the EU – taking place on 31 January 2020, the plan for a Conference on the Future of Europe was endorsed also by the other EU institutions as a way to relaunch the project of European integration, and address a number of weaknesses in the EU governance system.⁶

The aim of this contribution to the *Dialogue* is to offer a first analysis of the ambitious plan for a Conference on the Future of Europe. In particular, the contribution discusses from an EU law perspective whether the Conference can become a new model to reform the EU, and if so, how the process should be designed to succeed. As such, the contribution focuses on the perspective outcome of the Conference, exploring the EU reform mechanisms with a view to identify possible avenues towards further political integration in Europe.⁷ To this end, the contribution analyses the formal legal rules for treaty change enshrined in the current TEU, and explains the challenges that these pose towards a successful reform of the EU given the veto points embedded in it. At the same time, however, the contribution sheds light on the increasing tendency by the Member States to conclude *inter-se* agreements outside the legal order of the EU, and examines how this may offer an opportunity to policy-makers involved in the Conference to overcome obstacles towards reform and make this initiative a success.

The argument of the contribution is that the Conference on the Future of Europe can be an innovative model to reform the EU but that if the Conference wants to succeed in its ambitious objective, it must address face-on the challenge of treaty change.

² E. MACRON, *Lettre pour une renaissance européenne*, 4 March 2019, www.elysee.fr.

³ European Parliament press release, *2019 European Elections: Record Turnout Driven by Young People*, 24 September 2019, www.europarl.europa.eu (reporting a 50.6 percent turnout for EP elections, which is the largest participation increase since 1979).

⁴ See European Council statement, *European Council appoints new EU leaders*, 2 July 2019, press release 522/19.

⁵ U. VON DER LEYEN, *A Union that strives for more: My Agenda for Europe. Political Guidelines for the Next European Commission 2019-2024*, 16 July 2019, ec.europa.eu, p. 19.

⁶ See European Parliament resolution P9_TA(2020)0010 of 15 January 2020 on the European Parliament's position on the Conference on the Future of Europe; Communication COM(2020) 27 final of 22 January 2020 from the Commission, *Shaping the Conference on the Future of Europe*; European Parliament resolution P9_TA(2020)0153 of 18 June 2020 on the European Parliament's position on the Conference on the Future of Europe; and Council, Note from the Presidency of 24 June 2020, *Conference on the Future of Europe: Council Position*, Council Document 9102/20, www.consilium.europa.eu.

⁷ See further F. FABBRINI, *Possible Avenues for Further Political Integration in Europe*, study commissioned by the European Parliament Constitutional Affairs Committee, June 2020, from which this contribution draws.

In fact, the EU treaty amendment rule – by conditioning changes to the EU Treaties to the approval by all the Member States meeting in an intergovernmental conference (IGC) and unanimous ratification at the national level – represents a formidable obstacle to reforming the EU. However, in recent years – particularly in responding to the euro-crisis – EU Member States have increasingly resorted to *inter-se* international agreements concluded outside the EU legal order – which have done away with the unanimity requirement. And, within limits, this practice has been held to be legal by the CJEU. Drawing on this experience, therefore, policy-makers involved in the Conference on the Future of Europe should resolve to draft a new treaty – call it Political Compact – with a new ratification rule, which replaces the unanimity requirement with a super-majority vote: while Member States which have not ratified the new treaty would not be bound by it,⁸ they could not block the Political Compact from entering into force among those Member States that wish to advance integration further towards ever closer union.⁹

As such the contribution is structured as follows. Section II overviews the positions of the EU institutions and Member States on the mandate of the Conference on the future of Europe, and outlines its reform ambitions. Section III analyses the formal rules for treaty change enshrined in EU primary law, emphasising the requirement of unanimous ratification for treaty changes which is set therein – and the vain proposals to overcome it. Section IV explains how – given the failure to amend the EU treaty amendment rule – Member States have increasingly resorted to *inter-se* international agreements outside the EU legal order to avoid ratification crises. Building on this analysis, section V suggests that the Conference on the Future of Europe should therefore reflect on producing a Political Compact, whose entry into force would be subject to less-than-unanimous ratification rules – and offers guideposts that policy-makers could consider. Section VI, finally, concludes pointing out that reforming the EU outside the EU may be the best option to relaunch the project of EU integration at a time of crisis.

II. PLANS FOR THE CONFERENCE ON THE FUTURE OF EUROPE

While the debate on the future of Europe is now several years in the making,¹⁰ the proposal in favour of a Conference on the Future of Europe is relatively recent: as mentioned in the Introduction, the idea was first flouted by French President Emmanuel Macron in Spring 2019. Before the EP elections – at a moment of profound restructuring of the party system, with a strong polarization between pro- and anti-European political forces – President Macron proposed to renew the EU by putting square and centre the issue of constitutional reforms as a way to unite, strengthen and democratise

⁸ See also Arts 11-15 of the 1969 Vienna Convention on the Law of the Treaties.

⁹ See Preamble, TEU.

¹⁰ See Commission, *White paper on the Future of Europe*, COM(2017) 2025 final of 1 March 2017.

the EU and make it a sovereign power in an ever more uncertain world.¹¹ In particular, drawing from the French experience of citizens' conventions,¹² President Macron recommended to convene "with the representatives of the European institutions and the Member States, a Conference for Europe in order to propose all the changes our political project needs, with an open mind, even to amending the treaties".¹³ After the EP elections – in light of the positive result of pro-European forces in the pan-European electoral process, and a rising enthusiasm for participation in EU affairs – France detailed its plan for a Conference on the Future of Europe and, building on the special relation with Germany,¹⁴ took the lead in outlining a common roadmap forward.

In particular, France and Germany put forward in November 2019 a joint non-paper on the Conference on the Future of Europe, outlining key guidelines on the project.¹⁵ In this document France and Germany indicated their belief that "a Conference on the Future of Europe is prompt and necessary"¹⁶ and clarified that it "should address all issues at stake to guide the future of Europe with a view to make the EU more united and sovereign".¹⁷ In terms of scope, as the Franco-German proposal clarified, "the Conference should focus on policies and identify [...] the main reforms to implement as a matter of priority, setting out the types of changes to be made (legal – incl. possible treaty change [...])".¹⁸ Moreover, the Franco-German proposal indicated that "Institutional issues could also be tackled as a cross-cutting issue, to promote democracy and European values and to ensure a more efficient functioning of the Union and its Institutions".¹⁹ Finally, in terms of scenarios, the Franco-German proposal stated that the Conference should work in phases – tackling institutional issues first, and conclude during the French Presidency of the Council in spring 2022 with final "recommendations [to] be presented to the [European Council] for debate and implementation".²⁰

The proposal in favour of a Conference on the Future of Europe was fully taken on board by the new European Commission President von der Leyen. As she pointed out when explaining her political guidelines for the 2019-2024 term before the EP on 16 July 2019 the Conference on the Future of Europe would represent "a new push for Europe-

¹¹ E. MACRON, *Speech at Université La Sorbonne*, cit.

¹² See also French Assemblée Nationale, Commission des Affaires Européennes, *Rapport d'information sur les conventions démocratique de refondation de l'Europe*, no. 482, 7 December 2017.

¹³ E. MACRON, *Lettre pour une renaissance européenne*, cit.

¹⁴ See Treaty on Franco-German Cooperation and Integration (Treaty of Aachen).

¹⁵ See Franco-German non-paper on key questions and guidelines: Conference on the Future of Europe, 25 November 2019, images.politico.eu.

¹⁶ *Ibid.*, p. 1.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*, p. 2.

an democracy”.²¹ In particular, President von der Leyen stated that “The Conference should bring together citizens, [...], civil society and European institutions as equal partners [...] and should be well prepared with a clear scope and clear objectives, agreed between the Parliament, the Council and the Commission”.²² Moreover she indicated her readiness to follow up on what is agreed, including via “Treaty change”.²³ Subsequently, in her mission letter to the Commission Vice-President-designate for Democracy and Demography Dubravka Šuica, President von der Leyen emphasised the importance of agreeing “on the concept, structure, timing and scope of the Conference” and ensuring “the follow-up on what is agreed”.²⁴ In fact, when speaking again in front of the EP on 27 November 2019, when the whole new Commission was subject to a consent vote,²⁵ President von der Leyen mentioned once more her ambition to “mobilise Europe’s best energies from all parts of our Union, from all institutions, from all walks of life, to engage in the Conference on the future of Europe”.²⁶ These views were subsequently outlined in a position paper of the Commission on the Conference on the Future of Europe, released on 22 January 2020.²⁷

Moreover, the proposal for a Conference on the Future of Europe was also strongly backed by the EP, which quickly started preparing its position on the matter.²⁸ To this end, the EP set up an *ad hoc* working group (WG), representing all political parties,²⁹ to prepare its position on the initiative which was embraced by the full chamber in a resolution adopted on 15 January 2020.³⁰ Here the EP underlined how “the number of significant crises that the Union has undergone demonstrates that reform processes are needed in multiple governance areas”³¹ and therefore welcomed the Conference as an opportunity “to increase [the EU] capacity to act and make it more democratic”.³² In terms of structure, the EP proposed that the Conference should be based on a range of bodies, including a Conference Plenary, a Steering Committee, and an “Executive Coordination Board [to] be

²¹ U. VON DER LEYEN, *A Union that strives for more*, cit., p. 19.

²² *Ibid.*

²³ *Ibid.*

²⁴ U. VON DER LEYEN, Mission Letter to Dubravka Šuica, 10 September 2019, ec.europa.eu, p. 5.

²⁵ See European Parliament Decision P9_TA(2019)0067 of 27 November 2019 electing the Commission.

²⁶ U. VON DER LEYEN, *Speech at the European Parliament*, 27 November 2019, ec.europa.eu, p. 14.

²⁷ Communication COM(2020)27 final, cit.

²⁸ See also Chair of the EP Committee on Constitutional Affairs A. TAJANI, *Letter to the European Parliament President David Sassoli*, 15 October 2019 (indicating consensus that the EP should play a leading role in the Conference and reporting that AFCE as the competent committee of the EP stands ready to start working immediately to prepare the EP position on the matter).

²⁹ European Parliament Conference on the Future of Europe, *Main Outcome of the Working Group*, 19 December 2019, neweuropeans.net.

³⁰ European Parliament resolution (2020)0010, cit.

³¹ *Ibid.*, para. B.

³² *Ibid.*, para. 2.

composed of the three main EU institutions under Parliament's leadership".³³ In terms of scope, then, the EP stated that the Conference should address a "pre-defined but non-exhaustive" list of issues, including European values, democratic and institutional aspects of the EU and some crucial policy areas.³⁴ Nevertheless, the EP clarified that the Conference should "produce concrete recommendations that will need to be addressed by the institutions",³⁵ and called for "a general commitment from all participants in the Conference to ensure a proper follow-up of its outcomes",³⁶ including "initiating treaty change".³⁷

The proposal in favour of a Conference on the Future of Europe was also endorsed by the European Council, which on 12 December 2019 "considered the idea of a Conference on the Future of Europe starting in 2020 and ending in 2022"³⁸ and asked the incoming Croatian Presidency of the Council "to work towards defining a Council position on the content, scope, composition and functioning of such conference and to engage, on this basis, with the [EP] and the Commission".³⁹ The European Council also underlined that the need for the Conference to respect the inter-institutional balance, and to be "an inclusive process, with all Member States involved equally".⁴⁰ Moreover, while the European Council stated that "priority should be given to implementing the Strategic Agenda"⁴¹ and that the Conference should therefore "contribute to the developments of our policies",⁴² the new European Council President Charles Michel mentioned that the Conference should also serve as a way to change the EU by reforming it where needed.⁴³

On the basis of the mandate of the European Council, the Council of the EU on 3 February 2020 put forward a draft common position in favour of the Conference of the Future of Europe.⁴⁴ Here the Council recognised the need to "engaging in a wide reflection and debate on the challenges Europe is facing and on its long-term future"⁴⁵ and proposed the creation of a light institutional structure, focusing on policy priorities with a mandate to report to the European Council by 2022. Subsequently, under pressure from the EP,⁴⁶ the Council of the EU also eventually formalised on 24 June 2020 its posi-

³³ *Ibid.*, para. 24.

³⁴ *Ibid.*, para. 7.

³⁵ *Ibid.*, para. 29.

³⁶ *Ibid.*, para. 30.

³⁷ *Ibid.*, para. 31.

³⁸ European Council Conclusions of 12 December 2019, para. 14.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, para. 16.

⁴¹ *Ibid.*, para. 15.

⁴² *Ibid.*

⁴³ See European Parliament press release, *Ten Years of the Lisbon Treaty and the Charter of Fundamental Rights*, 18 December 2019, www.europarl.europa.eu.

⁴⁴ See Council, Note from the Presidency of 3 February 2020, *Conference on the Future of Europe*, Council Document 6575/20, www.consilium.europa.eu.

⁴⁵ *Ibid.*, para. 1.

⁴⁶ See European Parliament resolution (2020)0153, cit.

tion on the Conference on the Future of Europe: here the Council acknowledged how “reflecting on the challenges the EU is facing and on its future has become all the more important following the outbreak of the Covid-19 pandemic”⁴⁷ and stated that “[t]he Conference does not fall within the scope of Article 48 TEU”.⁴⁸

In sum, all the EU institutions have progressively embraced the plan to establish a Conference on the Future of Europe. In fact, following the Franco-German non-paper, also several other Member States have thrown their support behind this initiative, seeing it as the way to let the EU leap forward a decade after the adoption of the Lisbon Treaty.⁴⁹ Admittedly, many issues concerning the institutional organization and the constitutional mandate of the Conference still have to be worked out. In fact, while the EP and several Member States individually or jointly have pushed for the Conference to have an ambitious remit, with a clear role to revise the EU Treaties, the Council and other Member States are more prudent, and would rather want the process to serve as a redo of the citizens’ dialogue the EU organised in 2017-2019.⁵⁰ For this reason, a joint resolution of the three main EU institutions is awaited to sort out these issues and set the ultimate mission of the Conference. However, the recent Covid-19 health crisis has had an impact on the Conference, because the explosion of a global pandemic delayed the adoption of this joint resolution. As a result, the originally envisioned date to launch the Conference on the Future of Europe, scheduled to take place on Europe’s Day, 9 May 2020, in Dubrovnik was postponed.

Yet, Covid-19 has actually made the need for the Conference on the Future of Europe more needed than ever. As the EP underlined on 17 April 2020 in a broad resolution outlining its position on the action needed at EU level to combat Covid-19 and its consequences, “the pandemic has shown the limits of the Union’s capacity to act decisively and exposed the lack of the Commission’s executive and budgetary powers”.⁵¹ As a result, the EP stressed that “the Union must be prepared to start an in-depth reflection on how to become more effective and democratic and that the current crisis only heightens the urgency thereof; believes that the planned Conference on the Future of Europe is the appropriate forum to do this; is therefore of the opinion that the Conference needs to be convened as soon as possible and that it has to come forward with clear proposals, including by engaging directly with citizens, to bring about a profound reform of the Union, making it more effective, united, democratic, sovereign and resili-

⁴⁷ Council Document 9102/20, cit., para. 2.

⁴⁸ *Ibid.*, para. 21.

⁴⁹ See e.g. Italian non-paper for the Conference on the Future of Europe, 14 February 2020.

⁵⁰ Commission, *Citizens’ Dialogues and Citizens’ Consultations: Key Conclusions*, 30 April 2019, ec.europa.eu.

⁵¹ European Parliament resolution P9_TA(2020)0054 of 17 April 2020 on EU coordinated action to combat the Covid-19 pandemic and its consequences, para. 69.

ent".⁵² Moreover, EU leaders celebrated Europe's Day in May 2020 reaffirming their conviction that the Conference on the Future of Europe, which "was only delayed due to the pandemic, will be essential in developing" ideas to make the EU more transparent and more democratic.⁵³ And the centrality of the Conference on the Future of Europe as the "opportunity to open a large democratic debate on the European project, its reforms and its priorities" was mentioned also in the joint Franco-German initiative for a European Recovery from the coronavirus crisis of 18 May 2020.⁵⁴ All this suggests that the Conference on the Future of Europe is being seen by policy-makers as an ambitious initiative which should renew in depth the architecture of the EU, like prior similar out-of-the-box initiatives of the past.

III. CHALLENGES TO REFORM: THE RULES ON EU TREATY AMENDMENT

Nevertheless, if the Conference on the Future of Europe aspires to achieve a relevant reform of the EU, it must deal with the rules on treaty change in the EU and the challenges they pose. This requires analysing the legal provisions and political options for treaty reform in the EU, with the aim to offer guideposts that policy-makers should consider in defining the shape and scope of the Conference. The rules on EU treaty reform are currently enshrined in Art. 48 TEU, as modified at last by the Treaty of Lisbon. This provision presents a number of innovative features.⁵⁵ Yet, the fundamentals of the treaty revision procedure in EU law have remained unchanged since the early stages of the process of integration: Member States must unanimously approve treaty changes and unanimously ratify them.⁵⁶ As put it today by Art. 48, para. 4, TEU: "A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements".

Formally, Art. 48 TEU foresees nowadays two mechanisms to amend the EU Treaties: an ordinary revision procedure, and a simplified one. In both cases, pursuant to Art. 48, para. 2, TEU "the Government of any Member State, the European Parliament or the Commission may submit proposals for the amendment of the Treaties to the Council", which shall forward these to the European Council. In some cases, however, a less burdensome, simplified procedure can be used. In particular, pursuant to Art. 48, para. 6, TEU, a simplified revision procedure can be resorted to "for revising all or part of the

⁵² *Ibid.*, para. 72.

⁵³ See D. SASSOLI, C. MICHEL, U. VON DER LEYEN, *Joint Op-ed*, 9 May 2020, ec.europa.eu.

⁵⁴ See French-German Initiative for the European Recovery from the Coronavirus Crisis, 18 May 2020, Pressemitteilung n. 173/20, www.diplomatie.gouv.fr.

⁵⁵ See S. PEERS, *The Future of EU Treaty Amendments*, in *Yearbook of European Law*, 2012, p. 17 *et seq.*

⁵⁶ See already Art. 96 of the Treaty Establishing the European Coal and Steel Community (ECSC).

provisions of Part Three of the Treaty on the Functioning of the European Union” relating to the internal policies and actions of the EU (including the internal market and competition, agriculture, the area of freedom security and justice and EMU). In this case, the European Council – acting by unanimity after consulting the EP and the Commission – may adopt a decision amending all or part of the provisions of Part Three of the TFEU, which “shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements”. However, because Art. 48, para. 6, TEU explicitly affirms that the simplified revision procedure “shall not increase the competences conferred on the Union in the Treaties”, effectively this mechanism can only be used in limited cases.⁵⁷

As a result, the main mechanism to reform the EU Treaties is the ordinary revision procedure, which has codified in EU primary law the so-called convention method, originally experimented in the process that led to the Treaty establishing a European Constitution.⁵⁸ According to Art. 48, para. 3, TEU, “if the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission”. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation which is then submitted for ultimate consideration to, and approval, by the IGC of Member States’ governments. Pursuant to Art. 48, para. 3, TEU the European Council may decide by a simple majority “not to convene a Convention should this not be justified by the extent of the proposed amendments” – but it must obtain EP consent to do so: hence the EP can insist on calling a Convention to examine proposals for revisions to the EU Treaties.⁵⁹

Art. 48 TEU therefore puts in place a highly regulated process for amending the EU Treaties. Admittedly, other provisions permit changes to EU primary law.⁶⁰ Yet, Art. 48 TEU is the main route through which the EU Treaties can be modified. And while the

⁵⁷ But see European Council Decision 2011/199/EU of 25 March 2011, amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro (using the simplified revision procedure to amend Art. 136 TFEU by adding a paragraph that recognises “the Member States whose currency is the euro may establish a stability mechanism [...]”).

⁵⁸ See J.-C. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, p. 104.

⁵⁹ But see European Parliament resolution P7_TA(2010)0148 of 6 May 2010 on the draft protocol amending Protocol No 36 on transitional provisions concerning the composition of the European Parliament for the rest of the 2009-2014 parliamentary term (giving its consent under Art. 48, para. 3, TEU to proceed with an IGC without a convention).

⁶⁰ See e.g. G. AMATO, *Future Prospects for a European Constitution*, in G. AMATO, H. BRIBOSIA, B. DE WITTE (eds), *Genesis and Destiny of the European Constitution*, Bruxelles: Bruylant, 2007, p. 1271 (discussing the potentials of the so-called passerelle clauses to revise the EU Treaties).

Lisbon Treaty has created a simplified revision procedure – which gives the European Council a direct treaty-making role – it is the ordinary revision procedure which overall remains paramount. At the same time, while the Lisbon Treaty has now constitutionalised the convention method – which entrusts the preparation of treaty reforms to a mixed body where representatives of national parliaments and EU institutions sit alongside representatives of national governments – ultimately Art. 48 TEU has reaffirmed the original arrangement dating to the early European integration's treaties and carried over as an almost natural state of affair: it is the EU Member States' governments, meeting in the IGC, that have the power to adopt changes to the treaties by common accord – and these amendments enter into force when they are ratified by *all* Member States in accordance with their domestic constitutional requirements.

As is well known, though, the unanimity requirement for treaty change has become a major constraint in reforming the EU. If the need to obtain unanimous consent from all EU Member States as a condition to change the EU Treaties could have been understandable in a Union of 6 members, the requirement is nowadays a powerful challenge for a Union of 27 (after Brexit). In fact, while arguably during the last 28 years, the EU Treaties have been subject to a “semi-permanent treaty revision process”,⁶¹ – with four major overhauls occurring in short sequence: the Treaty of Maastricht of 1992, the Treaty of Amsterdam of 1996, the Treaty of Nice of 2001, and the Treaty of Lisbon of 2007 – ratification crises spelled the process. Voters in France and the Netherland sunk the Treaty establishing the European Constitution in 2005,⁶² and in Ireland they voted down the Treaty of Nice in 2001, and the Treaty of Lisbon in 2007 – requiring the European Council to come up with solutions, with additional reassurances added to the treaties that allowed in both cases a second, successful vote.⁶³ As Dermot Hodson and Imelda Maher have explained, national parliaments, courts and the people through referenda have become ever more important actors in the process of national ratification of EU Treaties, hence increasing the veto points against EU reforms.⁶⁴ In particular, a quantitative analysis shows that EU Member States’ “constitutional rules and norms underpinning the negotiation and consent stages [of EU treaty amendments] have shifted to provide a more prominent role to parliaments, the people and the courts”.⁶⁵

⁶¹ B. DE WITTE, *The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process*, in P. BEAUMONT, C. LYONS, N. WALKER (eds), *Convergence and Divergence in European Public Law*, Oxford: Hart, 2002, p. 39 *et seq.*

⁶² See N. BARBER, M. CAHILL, R. EKINS (eds), *The Rise and Fall of the European Constitution*, Oxford: Hart, 2019.

⁶³ See G. DE BÚRCA, *If at First You Don't Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change*, in *Fordham International Law Journal*, 2010, p. 1472 *et seq.*

⁶⁴ D. HODSON, I. MAHER, *The Transformation of EU Treaty Making: The Rise of Parliaments, Referendums and Courts since 1950*, Cambridge: Cambridge University Press, 2018.

⁶⁵ *Ibid.*, p. 16.

For this reason, a number of proposals have been put forward to amend Art. 48 TEU. After all, the requirement to obtain unanimous approval by all Member States to reform a treaty is actually exceptional from a comparative viewpoint.⁶⁶ Indeed, international organizations which are much less integrated than the EU allow its constituting treaty to be changed with a super-majority vote: for example, the United Nations allows its Charter to be amended by a vote of two-thirds of the members of the General Assembly provided changes are ratified in accordance with their constitutional requirements by two-thirds of its members, including all the five permanent members of the Security Council.⁶⁷ Considering that since the 1960s the EU has acquired features which are more typical of federal systems,⁶⁸ rather than traditional international organizations, thought should be given to the possibility of amending the EU foundational laws through procedures that require super-majority votes – as is typical of federal constitutional systems.

In the run-up to the Treaty establishing a European Constitution it was thus suggested to replace unanimity with a super-majority vote of five sixths of Member States as the rule for the entry into force of the reform treaty.⁶⁹ While the Convention did not itself consider this option,⁷⁰ the European Commission in a preliminary draft Constitution of the European Union promoted by then President Romano Prodi – and known as the Penelope project – embraced it.⁷¹ In particular, anticipating the problems that the unanimity rule would produce in the ratification process, the Commission proposed that the treaty establishing the European Constitution should ultimately enter into force if “by a given date, five sixths of the Member States have ratified this agreement”⁷² and that the “Member States which have not ratified are deemed to have decided to leave the Union”.⁷³ The Commission acknowledged that this represented “a break with Article 48 TEU”,⁷⁴ the then applicable rule on EU treaty change – but, it stated that this was “consistent with international law”⁷⁵ because sufficient guarantees applied to the hold-outs.

Yet, the Commission’s plan was criticised at the time from a strict legal point of view: as it was pointed out, the Commission’s proposal was illegal in light of EU law, because

⁶⁶ See also generally A. ROSAS, L. ARMATI, *EU Constitutional Law. An Introduction*, Oxford: Hart, 2012.

⁶⁷ Art. 108 of the UN Charter.

⁶⁸ See E. STEIN, *Lawyers, Judges and the Making of a Transnational Constitution*, in *American Journal of International Law*, 1981, p. 1 *et seq.*

⁶⁹ See European University Institute Robert Schumann Centre for European Studies, *Reforming the Treaties’ Amendment Procedures*, report submitted to the European Commission, 31 July 2000, www.eui.eu.

⁷⁰ But see V. GISCARD D’ESTAING, *Interview*, in *Financial Times*, 11 November 2002, p. 4 (suggesting need to have the new treaty enter into force even without the consent of all the then 25 Member States).

⁷¹ See Commission, *Feasibility Study: Contribution to a Preliminary Draft Constitution of the European Union*, 4 December 2002, www.europarl.europa.eu.

⁷² *Ibid.*, p. XII.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

“under the current rules of Art. 48 TEU, all the Member States must give their agreement to the changes” of the rules of ratification.⁷⁶ Ultimately, the Commission’s proposal never made it into the final treaty text drafted by the Convention. Rather – precisely in light of the failure of the treaty establishing a European Constitution – Art. 48, para. 5, TEU now foresees that “[i]f, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council”: but this effectively leaves the resolution of a future ratification crisis to the good will of the heads of state and government in the European Council.

IV. OPPORTUNITIES FOR REFORM: THE PRACTICE OF *INTER-SE* TREATIES OUTSIDE THE EU LEGAL ORDER

As a consequence of the difficulties of changing the EU Treaties, Member States have in very recent years explored with ever greater frequency other options to reform the EU. In particular – to overcome the disagreement characterising an ever more heterogeneous EU, and avoid the deadlock resulting from the unanimity rule – coalitions of Member States have increasingly concluded *inter-se* agreements outside the EU legal order, but closely connected to the functioning of the EU. Indeed, as Bruno De Witte pointed out, EU Member States remain subjects of international law and as such they are free to conclude international agreement between themselves – either all of them or just a group thereof.⁷⁷ This freedom is subject to several constraints. To begin with, *inter-se* agreements concluded between the Member States may not contain norms conflicting with EU law proper and cannot derogate from either primary or secondary law.⁷⁸ In fact, the CJEU has not hesitated to strike down bilateral agreements concluded between Member States as inconsistent with EU law.⁷⁹ Moreover, there are limits to how Member States can enlist the work of the EU institutions in agreements concluded outside the EU legal order.⁸⁰ In particular, as the CJEU ruled in *Pringle*, states are entitled, in areas which do not fall under the EU exclusive competence, to entrust tasks to the EU institutions, outside the frame-

⁷⁶ See B. DE WITTE, *Entry into Force and Ratification*, in B. DE WITTE (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, Florence: European University Institute, 2003, www.eui.eu, pp. 203 and 212.

⁷⁷ B. DE WITTE, *The European Union as an International Legal Experiment*, in G. DE BÚRCA, J.H.H. WEILER (eds), *The Words of European Constitutionalism*, Cambridge: Cambridge University Press, 2011, p. 19 *et seq.*

⁷⁸ See B. DE WITTE, *The Law as Tool and Constraint of Differentiated Integration*, EUI RSCAS Working Paper no. 47/2019, cadmus.eui.eu, p. 11.

⁷⁹ See e.g. Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea* [GC] (striking down a bilateral investment treaty between the Netherlands and Slovakia as incompatible with EU law).

⁸⁰ See S. PEERS, *Towards a New Form of EU Law? The Use of EU Institutions Outside the EU Legal Framework*, in *European Constitutional Law Review*, 2013, p. 37 *et seq.*

work of the EU, only provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU Treaties.⁸¹

Yet, besides these limitations, EU Member States have leeway to resort to international agreements concluded outside the EU legal order; and in concluding such agreements they can craft new rules governing ratification and entry into force. This is precisely what has happened in the context of the responses to the euro-crisis, with the adoption of the Fiscal Compact, the Treaty establishing the European Stability Mechanism (ESM) as well as the inter-governmental Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund (SRF).⁸² In 2012, 25 out of then 27 EU Member States signed up to the Fiscal Compact, which strengthened the rules of the EU Economic and Monetary Union (EMU), notably by requiring contracting parties to constitutionalise a balanced budget requirement.⁸³ In 2012, the then 17 Eurozone Member States also concluded the ESM, which endowed the EMU with a stabilization fund to support states facing fiscal crises.⁸⁴ And in 2014, 26 Member States also concluded an intergovernmental agreement which – in the framework of the nascent Banking Union, with its Single Supervisory Mechanism (SSM) and Single Resolution Mechanism (SRM) – established a SRF to support credit institutions facing a banking crisis and set rules on the transfer and mutualisation of the national contributions to the SRF.⁸⁵

The Fiscal Compact, the ESM Treaty and the intergovernmental Agreement on the SRF had special rules on their entry into force. In particular, Art. 14, para. 2, of the Fiscal Compact foresaw that: “This Treaty shall enter into force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification”. Art. 48 of the ESM Treaty provided that: “This Treaty shall enter into force on the date when instruments of ratification, approval or acceptance have been deposited by signatories whose initial subscriptions represent no less than 90 percent of the total subscriptions”. And Art. 11, para. 2, of the SRF Agreement stated that “This Agreement shall enter into force [...] when instruments of ratification, approval or acceptance have been deposited by signatories participating in the [SSM] and in the [SRM] that represent no less than 90 percent of the aggregate of the weighted votes of all Member States participating in the [SSM] and in the [SRM]” as determined according to Art. 3 of Protocol no. 36 on transitional provisions attached to the TEU, which assigned (until 2014) to each member state a number of weighted votes proportional to population for calculating majorities in the Council.

⁸¹ See Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*, para. 158.

⁸² See generally F. FABBRINI, *Economic Governance in Europe*, Oxford: Oxford University Press, 2016.

⁸³ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012, www.consilium.europa.eu.

⁸⁴ See Treaty Establishing the European Stability Mechanism, 2 February 2012, www.esm.europa.eu.

⁸⁵ See Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, 21 May 2014, register.consilium.europa.eu.

For the first time in the history of the EU, therefore, the Fiscal Compact, the ESM Treaty and the SRF Agreement bypassed the unanimity requirement for treaty change. In fact – while Art. 14, para. 3, of the Fiscal Compact clearly indicated that the treaty shall apply as from the date of its entry into force only to those states “which have ratified it” – by requiring ratification by just 12 Eurozone countries, it set approval by a *minority* of EU Member States as a condition for its entry into force.⁸⁶ Moreover, the overcoming of the unanimity requirement was even more striking in the case of the ESM: because Eurozone Member States contribute to the paid-in capital stock of the ESM *pro quota* – with each contracting party contributing on the basis of a proportional capital key distribution set in Annex II of the ESM Treaty – by subjecting entry into force of the treaty to the ratification, approval or acceptance of states representing 90 percent of the ESM capital, Art. 48 of the ESM Treaty essentially conditioned the operation of the ESM to the positive vote of just the largest Eurozone countries. Similarly, the SRF Agreement – while clarifying in Art. 12 that the treaty shall apply only “amongst the Contracting Parties that have deposited their instruments of ratification, approval or acceptance” – set a super-majority requirement for approval, connecting the importance of each member state’s ratification to its weighted vote in the Council.

The new ratification rules introduced in the Fiscal Compact, the ESM Treaty and the SRF Agreement were all designed to prevent a hold-out Member State from blocking a treaty from applying among the others. In fact, the explicit opposition by the UK to treaty change was the main reason why EU Member States decided to conclude the Fiscal Compact outside the EU legal order⁸⁷ – while admittedly reasons of German domestic politics played a larger role in pushing states to using an intergovernmental agreement, rather than an act of secondary EU law, for the SRF.⁸⁸ Be that as it may, the new rules on the entry into force of these EMU-related treaties profoundly changed the ratification game, because they shifted the costs of non-ratification to the hold-outs Member States.⁸⁹ In fact, the process of ratification of the Fiscal Compact in Ireland – the only Member State where a referendum was required – proved as much, as voters reluctantly endorsed the treaty, simply not to be left out from this initiative.⁹⁰ As a result, none of these EMU-related treaties faced issues in the national ratification procedures and they all entered into force as scheduled with all the Member States, including the reluctant ones, ultimately jumping aboard.

⁸⁶ See also F. FABBRINI, *The Fiscal Compact, the ‘Golden Rule’ and the Paradox of European Federalism*, in *Boston College International and Comparative Law Review*, 2013, p. 1 *et seq.*

⁸⁷ See M. GORDON, *The United Kingdom and the Fiscal Compact*, in *European Constitutional Law Review*, 2014, p. 28 *et seq.*

⁸⁸ See F. FABBRINI, *On Banks, Courts and International Law. The Intergovernmental Agreement on the Single Resolution Fund in Context*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 444 *et seq.*

⁸⁹ See C. CLOSA, *The Politics of Ratification of EU Treaties*, London: Routledge, 2013.

⁹⁰ See R. O’GORMAN, *An Analysis of the Method and Efficacy of Ireland’s Incorporation of the Fiscal Compact*, in M. ADAMS, F. FABBRINI, P. LAROUCHE (eds), *The Constitutionalization of European Budgetary Constraints*, Oxford: Hart, 2014, p. 273 *et seq.*

In sum, by going outside the legal order of the EU – provided they did not do anything in breach of EU law proper – Member States have been able to reform the EU, and specifically EMU. In fact, by resorting to *inter-se* agreements Member States have overcome the strictures of Art. 48 TEU, finding a solution to EU reform which is more consonant to a Union with more than two dozen members. In particular, by introducing *ad hoc* rules on the entry into force of the Fiscal Compact, the ESM Treaty and the SRF Agreement, Member States have overcome the veto that inheres to the EU treaty amendment rule, and thus ultimately guaranteed the speedy entry into force of these new *inter-se* agreements. Needless to say, the specific ratification rules set by these treaties are questionable. In particular, the veto power given only to the largest and wealthiest Member States in the ESM Treaty has raised eyebrows.⁹¹ Moreover, it was a matter of concern that recital 5 in the preamble of the ESM Treaty conditioned the granting of ESM financial assistance to the ratification of the Fiscal Compact – effectively putting countries in financial difficulties under duress to sign up to the Fiscal Compact as a *quid pro quo* to get ESM support. However, there is no doubt that the overcoming of the unanimity rule of ratification in these agreements is an important precedent, which opens new options also for the Conference on the Future of Europe.

V. REFORMING THE EU THROUGH A POLITICAL COMPACT?

As explained in section II the ambition of the Conference on the Future of Europe is to renew the EU at a critical time in its history. However, as underlined in section III, if the Conference were to propose a change to the Treaties this would run into the challenge of Art. 48 TEU – which is a formidable obstacle to success given the unanimity requirement embedded in it. As pointed out in section IV, this is why after all EU Member States have increasingly resorted to *inter-se* agreements outside the EU legal order, where they have codified special rules on approval and entry into force of these new treaties overcoming the unanimity rule. The analysis of the legal rules and political options for treaty reform in the EU, however, provides an important lesson that should be taken into account by policy-makers engaging in the nascent Conference on the Future of Europe.⁹²

First among these is the awareness that the rules on the entry into force of any reform treaty resulting from the Conference on the Future of Europe will have a major impact on the success of the initiative. Because of the veto-points embedded in Art. 48 TEU, any major reform plan that may emerge from the Conference on the Future of Europe risks foundering on the rocks of the unanimity requirement. After all, this is pre-

⁹¹ See C. GINTER, R. NARITS, *The Perspective of a Small Member State to the Democratic Deficiency of the ESM*, in *Review of Central and Eastern European Law*, 2013, p. 54 et seq.

⁹² See F. FABBRINI, *Possible Avenues for Further Political Integration in Europe*, cit., as well as C. CLOSA, *Looking Ahead: Pathways of Future Constitutional Evolution of the EU*, study commissioned by the European Parliament Constitutional Affairs Committee, PE 510.005, November 2014.

cisely a reason why EU Member States have opted not to use the standard EU amendment procedure to respond to the euro-crisis – but have rather acted outside the EU legal framework, adopting new intergovernmental treaties in the field of EMU which did not require approval by all the Member States to enter into force. Precisely the precedents set by the Fiscal Compact, the ESM Treaty and the Agreement on the SRF, however, offer a roadmap that institutional players in the Conference on the Future of Europe can use. To avoid the fate of prior treaties amendment that failed because of the need for unanimous state ratification, the Conference on the Future of Europe should resolve to channel the outcome of its process into a new treaty with new rules on the entry into force of the treaty itself, which do away with the unanimity requirement and thus change the dynamics of the ratification game in the 27 Member States.

Specifically, to overcome a complacency that the EU can ill afford at this stage, the Conference on the Future of Europe could propose the drafting of a new treaty – call it Political Compact.⁹³ Like the EMU-related treaties analysed above, the Political Compact would be an international agreement struck outside the EU legal order, which does not replace it but rather is functionally and institutionally connected to it. Moreover, the Political Compact would be subject to new rules on its entry into force, which do away with the unanimity requirement. In particular, the Political Compact could foresee its entry into force when ratified by a super-majority of e.g. 19 EU Member States, which corresponds circa to three fourths of the now 27 EU Member States. Just like the Fiscal Compact – and unlike the ESM Treaty and the SRF Agreement – the ratification of each Member State would count the same, consistent with the principle of the international equality of states. Yet, unlike the Fiscal Compact, both the ratification of Eurozone and non-Eurozone Member States would equally weight towards its entry into force.

The proposal put forward here resembles the one advanced at the time of the Convention by the European Commission in its Penelope project mentioned above – but, it differs from it in one essential way. The Penelope project proposal sought to amend the EU Treaties with a procedure that by its own admission broke the rules of the TEU itself. On the contrary, the proposal advanced here would be consistent with the TEU, as it would not surreptitiously amend Art. 48 TEU, but rather set a new ratification rule for a new, *inter-se* treaty. In fact, by being drafted as a separate interstate agreement – and provided this would not introduce any measure explicitly inconsistent with EU law – the Political Compact could meet the criteria of legality set by the CJEU notably in *Pringle* when reviewing *inter-se* agreements concluded between groups of Member States. Moreover, while the overcoming of the unanimity rule in the ratification process was unheard of, and revolutionary, in 2002, today the practice has now become real, and indeed quite ordinary – with the Fiscal Compact, the ESM Treaty and the SRF Agreement.

⁹³ See already S. FABBRINI, *Which European Union?*, Cambridge: Cambridge University Press, 2015.

Needless to say, in order to be legally water-proof the Political Compact would need to meet two criteria. First, from an international law perspective, the Political Compact should not apply to the non-ratifying states, guaranteeing them the free choice whether to join or not the treaty. From this point of view, therefore, the proposal advanced here differs from prior academic proposals to overcome unanimity in EU treaty revisions, which envisioned forcing the non-ratifying states into abiding by the new treaty against their will.⁹⁴ Second, from an EU law perspective, the Political Compact must comply with the conditions set by the CJEU in *Pringle*, which regulated the use of *inter-se* treaties outside the EU legal order – hence its content cannot violate EU laws. Yet, as the example of the EMU-related treaties adopted in response to the euro-crisis shows, there are a number of important new substantive and institutional reforms that Member States can legally implement outside the EU Treaties to expand EU powers or enhance EU decision-making procedures.⁹⁵ It is not difficult therefore to see how the Political Compact could improve the effectiveness and legitimacy of the EU without infringing the existing EU Treaties.

At the same time, the option to conclude a separate Political Compact treaty as the outcome of the Conference would mitigate many of the criticisms that have been raised during the negotiations of the EMU intergovernmental agreements. In fact, the processes of drafting the Fiscal Compact, the ESM Treaty and the Agreement on the SRF were purely diplomatic and secretive negotiations, which left out the EP, save for the pro-forma involvement of the Chairman of the Economic and Monetary Affairs (ECON) Committee.⁹⁶ On the contrary, the Conference on the Future of Europe would be a much more open, transparent and participatory process – and with full input from, and involvement by, the EP, which in fact would likely play a leading role in the steering of the Conference. Therefore, one could expect the Conference to steer away from the perils of intergovernmental decision-making, and that its output would rather resemble the features of the Treaty establishing the European Constitution produced by the European Convention. For these reasons, it seems likely that the Political Compact would

⁹⁴ See H. BRIBOSIA, *Revising European Treaties: A Plea in Favor of Abolishing the Veto*, Notre Europe Policy Paper no. 37/2009, spire.sciencespo.fr, p. 17 (stating that a reform treaty approved by a super-majority of states “would enter into force *erga omnes*, meaning that it would also bind the States which have not ratified the Treaty”).

⁹⁵ See e.g. ESM Treaty, Art. 3 (stating that the purpose of the ESM is to “provide stability support” to Eurozone Member States “if indispensable to safeguard the financial stability of euro area”); or Fiscal Compact, Art. 7 (stating that signatory Member States, “while fully respecting the procedural requirements of the Treaties on which the European Union is founded”, commit “to supporting the proposals or recommendations submitted by the European Commission” in the excessive deficit procedure, unless a reversed qualified majority opposes this).

⁹⁶ See V. KREILINGER, *The Making of a New Treaty: Six Rounds of Political Bargaining*, Notre Europe Policy Brief no. 32/2012, institutdelors.eu.

have greater legitimacy than the EMU-related treaties adopted during the euro-crisis:⁹⁷ as such, if subject to CJEU review, it could be looked at even more approvingly than the ESM Treaty, if this represents the way to allow the project of EU integration to move forward, on a more solid basis, between those who want it.⁹⁸

In fact, from a constitutional point of view, there is a major precedent for what is suggested here – namely the adoption of the oldest and most revered basic law in the world: the Constitution of the United States of America (US). While after the War of Independence in 1782 the 13 North American colonies had come together and established a union under the Articles of Confederation, this first constitution proved unable to serve well the interests of the nascent US.⁹⁹ As a result, in 1787 a convention of states' delegates was called in Philadelphia to propose amendments to the Articles.¹⁰⁰ However, this Convention reinterpreted its mandate and drafted a brand new document: the Constitution of the US.¹⁰¹ Crucially, though, the framers set into the Constitution itself the rule that ratification by 9 (out of 13) states would suffice for its entry into force.¹⁰² As explained by Michael Klarman, this was technically a breach of the Article of Confederation,¹⁰³ which required unanimous consent by the 13 states to amend the Articles themselves.¹⁰⁴ However, by replacing the Articles' unanimity requirement with a super-majority one for the entry into force of the Constitution – and by requiring the new Constitution to be approved by special states' ratifying conventions, set-up exclusively for this task – the framers were able to circumvent the opposition of some states, which otherwise would have doomed the whole constitutional endeavour.¹⁰⁵

Needless to say, if the Conference on the Future of Europe were to foresee a new ratification rule for the entry into force of a treaty resulting from its works, this could sanction the path toward a decoupling of the EU.¹⁰⁶ Indeed, Member States which

⁹⁷ See also L. PAPADOPOULOU, I. PERNICE, J.H.H. WEILER (eds), *Legitimacy Issues of the European Union in the Face of the Crisis*, Baden-Baden: Nomos, 2017.

⁹⁸ See also *ceteris paribus* Court of Justice, judgment of 10 December 2018, case C-621/18, *Wightman* (holding that the ultimate goal enshrined in the Treaties is to achieve ever closer union).

⁹⁹ See D. SMITH, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, in *San Diego Law Review*, 1997, p. 249 *et seq.*

¹⁰⁰ See G. WOOD, *The Creation of the American Republic: 1776-1787*, New York: Norton, 1993.

¹⁰¹ See M. FARRAND, *Records of the Federal Convention*, Vol. 1, New Haven: Yale University Press, 1911.

¹⁰² See Art. VII of the US Constitution.

¹⁰³ M. KLARMAN, *The Framers' Coup. The Making of the United States Constitution*, Oxford: Oxford University Press, 2016.

¹⁰⁴ See Art. XIII of the Articles of Confederation.

¹⁰⁵ See also B. ACKERMAN, N. KATYAL, *Our Unconventional Founding*, in *University of Chicago Law Review*, 1995, p. 475 *et seq.* (explaining that the last state – Rhode Island – only ratified the US Constitution in 1790, two years after it has already entered into force for the other states, and when a new federal government was already in place).

¹⁰⁶ See S. FABBRINI, *Europe's Future: Decoupling and Reforming*, Cambridge: Cambridge University Press, 2019.

would not ratify the Political Compact would be left out from this new treaty, with all the consequences that follow. Nevertheless, one should not underestimate the pressuring effect that this would have on states which are *prima facie* reluctant to ratify a treaty – a dynamic which as mentioned was visible e.g. in Ireland where the Fiscal Compact was approved in a referendum in 2012. Moreover, one must acknowledge that the process of EU differentiation has been going on for a while – particularly in the context of the Eurozone, which has increasingly acquired features of its own.¹⁰⁷ And the recent crises that the EU has weathered have further divided, rather than united the EU27.¹⁰⁸ For this reasons, a Political Compact could be seen as a positive step to relaunch European integration among the Member States that are willing to build a strong and sovereign political union, circumventing the opposition that could come e.g. from countries which are increasingly at odds with the EU founding principles and values.¹⁰⁹

VI. CONCLUSION

The Conference on the Future of Europe represents an innovative model to reform the EU – although to this day many details of the Conference's mission and structure remain to be sorted out. However, as this contribution has pointed out, while the EU institutions and the Member States still tease out the constitutional mandate and institutional organization of the Conference, it is important they bear in mind the constraints of treaty reform. Art. 48 TEU foresees a cumbersome process of treaty amendment, which is why Member States have increasingly resorted to *inter-se* agreements outside the EU legal order – notably in the context of the responses to the euro-crisis. If it wants to succeed, the Conference on the Future of Europe could thus draw lessons from these precedents. Much like in Messina in 1955, or in Laeken in 2001, the EU needs new initiatives to relaunch the project of integration – and the Conference on the Future of Europe is an original, out-of-the-box idea to renew the EU. Much like in Philadelphia in 1787, however, the Conference on the Future of Europe must also come up with courageous inventions to make sure that reform efforts are not sacrificed on the altar of the unanimity requirement for treaty change. In the end, therefore, the Conference on the Future of Europe will succeed in

¹⁰⁷ See C. CALLIESS, *The Governance Framework of the Eurozone and the Need for a Treaty Reform*, in F. FABBRINI, E. HIRSCH BALLIN, H. SOMSEN (eds), *What Form of Government for the European Union and the Eurozone?*, Oxford: Hart, 2015, p. 37 *et seq.*

¹⁰⁸ See F. FABBRINI, *Brexit and the Future of the European Union: The Case for Constitutional Reforms*, Oxford: Oxford University Press, 2020.

¹⁰⁹ See in particular European Commission reasoned proposal in accordance with Article 7(1) of the Treaty on European Union for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final of 20 December 2017, and European Parliament resolution P8_TA(2018)0340 of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

proposing “all the changes our [European] political project needs”¹¹⁰ only if it combines forward-looking political ambition with clever legal expertise – and this suggests considering the drafting of a Political Compact, *i.e.* a separate treaty subject to ratification rules which do not require the unanimous approval of all Member States.

¹¹⁰ E. MACRON, *Lettre pour une renaissance européenne*, cit.